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MISCELLANEOUS NOTES.

MALICIOUS INTERFERENCE WITH CONTRACT.—In *Angle v. Chicago &c. R. Co.*, 151 U. S. 1, it is held, following the English cases of *Lumley v. Gye*, 2 E. & B. 216, and *Bowen v. Hall*, 6 Q. B. Div. 333, that if one maliciously interferes in a contract between two parties, and induces one of them to break that contract, to the injury of the other, the party injured can maintain an action against the interferer. But in two recent cases in Kentucky, *Chambers v. Baldwin*, 91 Ky. 121 (34 Am. St. Rep. 165), and *Boulier v. Macauley*, 91 Ky. 135 (34 Am. St. Rep. 171), the English cases are disapproved, and it is held that an action cannot in general be maintained for inducing a third person to break his contract with the plaintiff, even if it be alleged that the defendant's interference was malicious. The only exceptions were declared to be where apprentices, menial servants, and others whose sole means of living was by manual labor, are enticed to leave their employment, or where a person has been procured, against his will or contrary to his purpose, by coercion or deception of another to break his contract.

It is settled in England that in order that an action may lie for interference with contract, causing its breach, two things must concur: (1) The defendant's interference must be malicious; and (2) the plaintiff must have suffered actual damage. Pollock on Torts, 668–673.

In view of the importance of this subject, it may be of interest to give the following summary of the result of the English decisions to date, which we find in *The Law Quarterly Review* (London), October, 1895, pp. 306–8. It is said by the editor, Sir Frederick Pollock, to be from the pen of "a very learned contributor":

"How far can one person, X, without exposing himself to an action, induce another person, M, to break a contract, or not to enter into a contract, with a third party, A?

"With regard to this admittedly difficult inquiry, the line of cases beginning in 1853 with *Lumley v. Gye*, 2 E. & B. 216, and ending in the present year with *Flood v. Jackson*, '95, 2 Q. B. (C. A.) 21, 14 R. June 147, suggests the following general conclusions, which however can be maintained only on the assumption—which is possibly erroneous—that *Temperton v. Russell*, '93 1 Q. B. (C. A.) 715, and *Flood v. Jackson* are well decided.

"1. X, if he acts without any malicious motive, and without any desire to benefit himself at A's expense, may advise M to break a contract which M has made with A; and if his advice is followed does not expose himself to an action by A. (*Bowen v. Hall*, 6 Q. B. Div. 333, especially p. 338.) Thus, if M is engaged to marry A, and X, with a view to M's happiness, advises and induces her to break off the engagement with A, X incurs no liability to A. (See *Lumley v. Gye*, 2 E. & B. 216, 247.) And *semble* the case would be the same even if X, while still acting solely with a view to M's benefit, offered her some pecuniary advantage for breaking her contract with A; and *a fortiori* X is not liable to an action if, without any malice or view to his own interest, he dissuades M from entering into any contract, *e. g.* a contract of marriage, with A.

"2. X, for the promotion of his own trade, or for the sake of avoiding competition in his trade, may deal with M on terms which are intended to induce him, and which do induce him, not to enter into contracts with A and others, and X does not thereby incur any liability to an action. Thus X has a right to sell M goods at a lower rate on condition that M shall not purchase goods of the same kind from A and others; and so X has a full right to offer his goods or services at a rate which is below the price which is remunerative, and thereby put an end to the competition of A and others, and in neither case does X expose himself to an action. Competition, in short, in matters of trade is perfectly lawful, and does not become actionable because it injures a man's rivals. (The Mogul Case, '92 A. C. 25.) It may indeed be laid down that the general rule of law is, that as long as a man simply exercises the rights which the law gives him he does not expose himself to an action on the part of persons damaged by the exercise of his rights; and this in general, though not invariably, holds good even though he exercise his rights, *e. g.* as a landowner, with a view to the injury of others. Compare *Corporation of Bradford v. Pickles*, '95, 1 Ch. 145 (C. A.), and *Chasemore v. Richards*, 7 H. L. C. 349, 388.

"3. X renders himself liable to an action by A if by means which are in themselves unlawful, *e. g.* by assaulting M, or threatening M with violence, he induces M to break a contract with A, or not to enter into a contract with A.

"4. X renders himself liable to an action by A, if for the purpose of injuring A (*i. e.*, maliciously), or of benefiting himself at A's expense, he induces M to break a contract with A; as when X, by the offer of higher wages, induces M to break a contract of service with A, and enter into the service of X. (*Bowen v. Hall*, 6 Q. B. Div. 333; *Lumley v. Gye.*)

"5. X renders himself liable to an action by A if for the purpose of injuring A (*i. e.* maliciously) he induces M not to enter into a contract with A, and this is so even though the inducement to M not to contract with A is the threat by X to do some act which in itself X has a right to do, causing inconvenience or damage to M. This is apparently, at any rate, the principle established by *Temperton v. Russell* and *Flood v. Jackson*. These cases, it is submitted, go to this length: that if X, with a view to compel M. not to employ A or deal with A, refuses himself to deal with M unless M ceases to deal with or employ A, and thereby does induce M not to deal with or employ A, X does a malicious act, for which he is liable to an action by A. As regards the class of cases to which *Temperton v. Russell* and *Flood v. Jackson* belong, it appears to be established that 'what would otherwise be a legal act may be made illegal by the addition of an intention to injure

another person who is in fact injured' thereby. (*Flood v. Jackson*, '95, 2 Q. B. (C. A.) p. 41, judgment of Rigby L. J.)

"6. In any case in which, under the above principles, X is not liable to an action by A, it would seem that X, Y, and Z, if they join in inducing M to break or not to enter into a contract with A, are not liable to proceedings for conspiracy; and, conversely, where X does, under the above principle, expose himself to an action by A, it would seem that X, Y and Z, if they join in inducing M to break or not enter into a contract with A, are liable to proceedings for conspiracy."

With reference to the case of *Flood v. Jackson* (the doctrine of which is stated under "5" above), Mr. Pollock says (L. Q. R. October, '95, p. 306): "We have the gravest doubt whether this decision can be correct, and whether it is not really an attempt to restore the old doctrine of conspiracy exploded by the House of Lords in the Mogul Steamship Co.'s case. [See *Mogul Steamship Co. v. McGregor*, 23 Q. B. Div. 598, affirmed in H. L. '92, A. C. 25.] But as we understand this case is going to the House of Lords, we say no more at present by way of criticism." As to malice, Lord Esher is reported to have said in *Flood v. Jackson*, 14 R. June 151: "We have been invited in this case to define malice, but I decline to tell trades unions what is and what is not malice." See *Crump v. Com.*, 84 Va. 927 (10 Am. St. Rep. 895).

University Teaching of English Law.—In the October number of the Register, pp. 467–8, reference was made to the admirable address on the above subject, read at Detroit, August 27, 1895, by Prof. James Bradley Thayer, of Harvard University, as chairman of the Section on Legal Education of the American Bar Association. In concluding his address, Prof. Thayer thus sums up his views:

"Let me now finally come down to this question: If what I have been saying as to the scope of the work of the university teaching of law be true, what does it mean as regards the outfit and the carrying on of these schools?

"It means several things. (1) Limiting the task of the instructors. Instead of allotting to a man the whole of the common law, or half a dozen disconnected subjects at once, it means giving him a far more limited field—one single subject, perhaps; two or three at most; if more than one, then, if possible, nearly related subjects; to the end that his work of instruction may be thoroughly done, and that as the final outcome of his studies some solid, public, and permanent contribution may be made to the main topic which he has in hand.

"It means (2) that instructors shall give, substantially, their whole time and strength to the work. In mastering their material and qualifying themselves for their task, they have in hand, say for the next two generations, much formidable labor in exploring the history and chronological development of our law in all its parts. On this, as I have indicated, a brave beginning has been made, and it is already yielding the handsomest fruits. They have also, of course, all the detail of their difficult main work of teaching; and this, when the work is fitly performed, calls for an amount of time, thought, and attention bestowed on the personal side of a man's relation to his students which instructors now can seldom give.

"It means (3) that the pupils also shall give all their time to the work of legal study while they are about it. There is more than enough in the careful pre-

liminary study of the law to occupy three full years of an able and thoroughly trained young man. It is, I think, a delusion to suppose that this precious seed-time can profitably be employed, in any degree, in attendance upon the courts or in apprenticeship in an office. I do not speak, of course, of an occasional excursion into these regions when some great case is up or some great lawyer is to be heard, or of the occasional continuous use of time in such ways during these long vacations which are generally allowed nowadays. Nor do I mean to deny that attendance upon courts to witness the trial of a case now and then will be a good school exercise. I speak only of systematic attempts to combine attendance at law schools with office-work and with watching the courts. The time for all that comes later, or perhaps in some cases, before.

"It means (4) that generous libraries shall be collected at the universities suited to all the ordinary necessities of careful legal research; and it also means gathering at some one point in the country, or at several points, the best law library that money can possibly buy.

"And (5), in saying that proper university teaching of law means all this, I am saying in the same breath that it means another thing, viz., the endowment of such schools. The highest education always means endowment; the schools which give it are all charity schools. What student at Oxford or Cambridge, at Harvard, Yale, Columbia, Ann Arbor, or Chicago, pays his way? We must recognize, in providing for teaching our great science of the law, that it is no exception to the rule. Our law schools must be endowed as our colleges are endowed. If they are not, then the managers must needs consult the market, and consider what will pay; they will bid for numbers of students instead of excellence of work. They will act in the spirit of a distinguished, but ill-advised, trustee of one of the seats of learning in my own State of Massachusetts, when he remarked 'We should run this institution as we would run a mill; if any part of it does not pay, we should lop it off.' They will come to forget that it is the peculiar calling of a university to maintain schools that do not pay, or, to speak more exactly, to maintain them whether they pay or not; that the first requisite for the conduct of a university is faith in the highest standards of work; and that if maintaining these standards does not pay, this circumstance is nothing to the purpose—maintained they must be, none the less. It has been justly said that it is not the office of a university to make money, or even to support itself, but wisely to use money.

"If, then, we of the American Bar would have our law hold its fit place among the great objects of human study and contemplation; if we would breed lawyers well grounded in what is fundamental in its learning and its principles, competent to handle it with the courage that springs from assured knowledge, and inspired with love of it; men who are not, indeed, in any degree insensible to worldly ambitions and emoluments, who are, rather, filled with a wholesome and eager desire for them, but whose minds have been lifted and steadied and their ambitions purged and animated by a knowledge of the great past of their profession, of the secular processes and struggles by which it has been, is now, and ever will be, struggling towards justice and emerging into a better conformity to the actual wants of mankind—then we must deal with it at our universities and our higher schools as all other sciences and all other great and difficult subjects are dealt with, as thoroughly, and with no less an expenditure of time and money and effort."

WHO ARE FELLOW-SERVANTS.—We commend to our readers the following extract from a recent opinion delivered by Judge Dent, of the West Virginia Court of Appeals. It is reproduced from the *Chicago Law Journal*, which comments upon it as follows:

"The Supreme Court of Appeals of West Virginia in deciding the case of *Flannegan v. Chesapeake & Ohio Ry. Co.*, gives an unusually clear definition of that vexing term 'fellow-servant,' which so often seems to occasion judicial strabismus. As a rule when an employee of a corporation or company seeks to recover damages for injury received while engaged in his line of work, the relation of 'fellow-servant' is sought by his employer to be established between the injured and the one whose negligence caused the injury. The law of 'fellow-servant' is invoked and the term made so elastic as to stretch from porter to president, but this blanket construction finds no favor with the West Virginia Court, as evidenced by the following extracts from the opinion delivered by Justice Dent:"

"The definition of 'fellow-servant,' as settled by recent decisions, is, those 'who are so far working together as to be practically co-operating, and to have opportunity to control or influence the conduct of each other, and have no superiority, the one over another' (*Madden v. Railway Co.*, 28 W. Va. 619), while it is held that those who act in a superior position, and have the right to direct and control the conduct of others are not fellow-servants of such others, especially in discharge of superior duties (*Riley v. Railway Co.*, 27 W. Va. 146; *Core v. Railroad Co.*, 38 W. Va. 456). The rear brakeman or flagman on a train is the fellow-servant of the front brakeman, for each has his respective, separate, yet dependent duties to perform in the running of the train; and they may influence, and even control, each other's conduct, yet they are neither superior to, nor can they control each other. Yet the flagman occupies a far different relation towards the trainmen of all other trains, for, in giving them warning of the obstruction of the track by the train to which he belongs, he performs a duty delegated to him by the master; and for his failure to discharge it the master is liable, for it is one of the master's personal or non-assignable duties to keep the track free from obstructions, for the safety of his employees. So a flagman, in discharging the same duty, acts as a fellow-servant to some, and as the superior or master to others, of his co-employees. Two persons who are called upon to perform the same duty, in effect, may occupy a relatively different position to the same employee, in its discharge. For instance, the flagman protects his co-employees by warning the approaching train, while the master, the dispatcher, and the operator render them the same protection by not allowing the train to use the track until it is clear. One stops the train. The other holds it back. The one is a part of the train, while the other belongs to an entirely different department, which has the supervision and management of all trains, and yet is no part of any train, but is entirely stationary. The one acts for self protection. The other, being in no personal danger, acts for the safety of others, and the dispatch of his master's business. In this case the defendant, seeking to discharge its personal duty and provide a safe track, and at the same time facilitate the rapid movement of trains, established the signal station, and placed the operator in charge, with full authority, by means of a code of signal orders equally as effective as any other kind could possibly be, to control the running of all trains over this block; and all trainmen, of every train, were

under absolute rule to watch for and obey her orders before they dare enter upon the block. If she had been attentive to her duties, she must have known the block was occupied and obstructed, and her knowledge was the knowledge of the master, yet, in the face of that fact, she negligently gives a peremptory signal for the train to proceed. In what way could she possibly be the fellow-servant of the trainmen, who are entirely at her command and who can neither influence nor control her independent actions? She is as much the master of her section block as the master is of the whole road. In *Lewis v. Seifert*, 116 Pa. St. 647, it is held: 'The master owes to every employee the duty of providing a reasonably safe place in which to work. This is a direct, personal, and absolute obligation; and while the master may delegate these duties to an agent, such agent stands in the place of the principal, and the latter is responsible for the acts of the agent. And where the master or superior places the entire charge of his business, or a distinct branch of it, in the hands of an agent or subordinate, exercising no discretion or oversight of his own, the master is held liable for the negligence of such agent or subordinate.' *Mullan v. Steamship Co.*, 78 Pa. St. 25; *Railroad Co. v. Bell*, 112 Pa. St. 400. 'It would be a monstrous doctrine to hold that a Railroad Company could frame such schedules as would inevitably or even probably, result in collisions and loss of life. This is a personal, positive duty; and while a corporation is compelled to act through agents, yet the agents, in performing duties of this character, stand in the place of, and represent, the principal. In other words, they are vice-principals.' *Lewis v. Seifert*, 116 Pa. St. 647. In the case of *Railway Co. v. Salmon* it is said: 'Higher officers, agents, or servants cannot, with any degree of propriety be termed fellow-servants with the other employees, wh do not possess any such extensive powers, and who have no choice but to obey such superior officers or servants. Such higher officers, agents, or servants must be deemed in all cases, when they act within the scope of their authority, to act for their principal in the place of their principal, and in fact to be the principal.' 14 Kan. 524; *Darrigan v. Railroad Co.*, 52 Conn. 285. A volume might be written on this subject, and numerous authorities cited for and against the rule of vice-principal, as propounded in the case of *Haney v. Railway Co., supra;* but such rule has become too firmly established in this State to be departed from now, and must be carried out to its legitimate results, until abrogated or altered by legislation. It undoubtedly bears severely on corporations, but its object is the safety and preservation of life and limb. The doctrine, as recognized and enforced in this State, is that it is the personal or non-assignable duty of the master (1), to exercise reasonable care in providing and keeping in repair suitable machinery, and all necessary appliances, including a safe place to labor; (2) to exercise a like care to provide and retain suitable servants for each department of service; (3) to establish, conform to, and enforce compliance with proper rules and regulations. These are the superior duties, for the proper performance of which the master is responsible, whether he intrusts them to a department, or any employee, of any grade, and the neglect of which by the agent or agency to which they are intrusted renders the master liable to any one injured by reason of such neglect, against whom and to whom contributory negligence cannot be shown or imputed, from his own act or the act of a fellow-servant, whether it be of commisssson or omission. *Daniel's Adm'r v. Railway Co.*, 36 W. Va. 397; *Cooper v. R. R. Co.*, 24 W.Va. 37; and other cases heretofore cited; also,

Schroeder v. Railway Co., 108 Mo. 323; *Foster v. Railway Co.*, 115 Mo. 165. The decisions of many jurisdictions are not in line with our decisions on this subject. 7 Am. & Eng. Enc. Law, 821 [tit. 'Fellow-Servants']. The rule of stare decisis applies with impregnable force in this instance, and from which there is no way of escape, even if the Court were so inclined, unless by an utter and reprehensible disregard of all precedent."

The case of *Norfolk & Western R. Co. v. Nuckols*, the opinion in which we publish in full in this issue (*ante* p. 579), is not in conflict with the foregoing views. While Keith, P., does say, under paragraph 7, p. 589, that a track repairer and engineman must each be considered as having had the risk of the negligence of the other in contemplation when he entered the company's service, and therefore to have assumed such risk, yet this must be read in connection with what had been previously said under paragraph 4 on the same page: that is, that it is the master's duty to furnish "suitable and safe appliances, machinery, *structure and roadway*." This latter duty the master cannot delegate to a fellow-servant and thus himself escape liability. So that this case does not establish the principle that in *all* cases an engineman and track repairer are fellow-servants. For example, if, instead of the track repairer being injured through the negligence of the engineer, the case had been the reverse, and the engineer been injured by an insufficient roadway, due to the negligence of the track repairer, the latter's negligence would not have precluded a recovery—the duty to keep the roadway in good condition being one which could not be delegated so as to relieve the master from liability. Such was the case of *Moon v. R. & A. R. Co.*, 78 Va. 745, referred to in President Keith's opinion. See *Union Pac. R. Co. v. Daniels*, 152 U. S. 684; *R. & D. R. Co. v. Burnett*, 88 Va. 538.

THE RIGHT OF LATERAL SUPPORT AS AGAINST MUNICIPAL CORPORATIONS.—On the principle that municipal corporations constitute a part of the government, and are not liable in damages for injuries to individuals, inflicted in the exercise of governmental functions, it is very generally held that an abutting proprietor has no common law right of support against a municipal corporation, when the latter proceeds, under due authority and in a proper manner, to grade its streets. The city is under no obligation to build retaining walls or to furnish other support for soil or buildings or to pay damages in case the soil or buildings fall into the street in consequence of such grading. This principle is a well established exception to the general rule of lateral support, discussed in 3 Min. Inst. 25. The city, having the right to grade the street, is under no greater liability with respect to the falling of the soil or buildings into the street, than in respect to any other consequential injury resulting—such as rendering approach more difficult, or otherwise decreasing the value of the property. And as the city has no right to *grant* the right of support, and it being incapable, in the nature of things, of adverse use, it follows that in the right cannot be acquired by *prescription*. 2 Dillon Munic. Corp. (4th ed.) 990-1; Note to *Perry v. Worcester* (Mass.), 66 Am. Dec. 434-442; *Fellowes v. New Haven* (Conn.), 26 Am. Rep. 447, and note 457-462; Note to *Larson v. Metropolitan etc. Co.* (Mo.), 33 Am. St. Rep. at p. 465; Note to *Parke v. Seattle* (Wash.), 34 Am. St. Rep. 845-851.

It is to be observed, however, that the Virginia Court of Appeals has estab-

lished a new doctrine on this subject, in holding that the right of support does exist as against a municipal corporation, and to this extent qualifying the city's right of graduation. See *Stearnes v. City of Richmond*, 88 Va. 992, reported also in 29 Am. St. Rep. 758.

In connection with the latter case, Mr. Freeman says (33 Am. St. Rep. 466): "There is not much likelihood that the bold course of the Virginia court will be followed by many States." The court bases its decision chiefly upon cases from those states whose constitutions prohibit the "damaging" of private property without just compensation, and fails to notice the distinction between this language and that of the Virginia constitution, which prohibits the "taking" merely—a distinction which seems to be perfectly well established. See 2 Dillon Munic. Corp. (4th ed.), 995a, *et seq;* Note to *O'Brien v. Philadelphia* (Pa.) 29 Am. St. Rep. at p. 837; *Chicago v. Taylor*, 125 U. S. 161.

CORPORATIONS AND PUNITIVE DAMAGES, AGAIN.—In our October number (p. 471) we had something to say about the liability of corporations for punitive damages. In the *Central Law Journal* of October 18, 1895 (Vol. 41, p. 307), Judge Seymour D. Thompson has an excellent article on the same subject.

Judge Thompson strongly maintains the view of the majority of the courts, which hold that a corporation may, under proper circumstances, be held liable for punitive damages, though the act of the servant or agent be neither authorized nor ratified. In our brief note on the subject we referred to the contrary view as the more logical, though not so well sustained by authority. Judge Thompson demonstrates that the one is as logical as the other, and that the rule is not one of logic at all, but of public policy.

Directors are but agents of the stockholders, and it is the latter who in fact bear the burden of the exemplary damages. Yet the contrary, or Federal, view authorizes punitive damages upon ratification of the tortious act by the directors, or other governing body. So that, after all, the stockholders who, in their aggregate capacity, really compose the corporation are mulcted in punitive damages for the act of their agents, which they have neither authorized nor ratified. In the one view, the corporation is rendered liable for such damages, through the act of a single agent, in the other the intervention of two agents is required.

Judge Thompson says: "It is not a rule of logic at all, but it is wholly a rule of public policy, expediency and safety. If the rules of law are to be made to conform to logic, then this rule of [punitive] damages must be abolished, not only in regard to corporations, but in regard to individuals; for it is conceded on all hands that it is illogical to import into civil actions for damages the sanctions of the criminal law." The subject is also discussed at length and with great learning in 5 Thomp. Corp. 6377-6395.

We copy the following from the *Green Bag*. It bears evidences of genuineness on its face. No professional humorist could have done it.

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